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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is not yet reported but is set forth in Appendix A to this statement. The judgment of the District Court is set forth in Appendix B. The report and order of the Interstate Commerce Commission in Finance Docket No. 18866, *Alleghany Corporation Stock*, appears at pages 518–537 of the printed record[1] in *Alleghany Corporation et al. v. Breswick & Co. et al.*, 353 U. S. 151, and is also set forth in Appendix C.

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[1] (R. —) references are to the printed record in the prior proceedings in this Court.

JURISDICTION

The judgment of the District Court was entered on October 17, 1957. Notice of appeal was filed in that court by the Interstate Commerce Commission on November 13, 1957.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by this Court's decision in the prior appeal in this action. *Alleghany Corporation et al.* v. *Breswick & Co. et al.*, 353 U. S. 151.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix D.

QUESTIONS PRESENTED

The District Court set aside an order of the Interstate Commerce Commission authorizing Alleghany Corporation to issue not exceeding 1,367,440 shares of 6% convertible preferred stock in exchange for outstanding shares of its cumulative 5½% preferred stock, and to issue not exceeding 14,768,352 shares of common stock upon the conversion of the convertible preferred stock. The sole ground for the decision was that the Commission lacked power to act upon Alleghany Corporation's application under Section 20a of the Interstate Commerce Act for authorization to issue such securities, unless and until it found that Alleghany's control of the New York Central

Railroad Company is "consistent with the public interest" within the meaning of Section 5 (2). The questions presented are—

1. Whether the decision of the court below complies with the decision and mandate of this Court in *Alleghany Corporation et al.* v. *Breswick & Co., supra.*

2. If the decision below is consistent with the decision and mandate of this Court.

(a) Whether Alleghany Corporation's acquisition of control of New York Central Railroad Company and its subsidiaries involved an acquisition of control of two or more carriers requiring the Commission's approval under Section 5 (2), and, if so,

(b) Whether the Commission must find that such control is consistent with the public interest before it may authorize under Section 20a the issuance of securities by Alleghany Corporation.

(c) Whether the appellees had standing to raise questions (a) and (b) and whether the District Court was precluded from considering them by the provisions of paragraph (11) of Section 20a.

STATEMENT

This appeal arises out of the decision of the District Court upon remand from this Court in *Alleghany Corporation et al.* v. *Breswick & Co., et al., supra.*

The prior proceedings in the District Court and in this Court. This litigation arose out of a suit instituted by the appellees in the court below challenging (1) orders of the Interstate Commerce Commission, under Section 5 (3) of the Interstate Commerce Act, determining *inter alia*, that Alleghany Corporation "shall be considered as a carrier subject to the provisions of * * * section 20a (2) to (11), inclusive, of the Interstate Commerce Act" (which subject security issues by carriers to the prior approval of the Commission), and (2) an order of the Commission authorizing Alleghany to issue 6% convertible preferred stock and common stock as indicated above. In the first round of this litigation, the court below held that the Commission lacked jurisdiction to determine that Alleghany should be considered as a carrier for the purposes of Section 20a, and, therefore, that the Commission also lacked power to authorize Alleghany to issue securities. Upon appeal, this court reversed the judgment of the District Court, and sustained the Commission's order under Section 5 (3) that Alleghany should be considered as a carrier for the purpose of regulating its issuance of securities. Thereupon, this Court directed that the case be remanded "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act" (333 U. S. at 175).

The proceedings before the Commission on the Section 20a application. On February 18, 1955, Alleghany filed with the Commission an application (R. 371–392) under Section 20a of the Interstate Commerce Act for authorization to issue not exceeding 1,367,440 shares of 6% convertible preferred stock, $10 par value, in exchange for outstanding shares of its cumulative 5½% preferred stock, Series A, $100 par value, and to issue not exceeding 14,768,352 shares of its common stock upon conversion of the convertible preferred stock. There were outstanding 136,744 shares of the 5½% preferred stock, with accrued and unpaid dividends (as of May 1, 1955) amounting to $132 per share, or an aggregate of more than $17,000,000. It was proposed to offer 10 shares of the new 6% preferred stock, par value $10, in exchange for each share of 5½% preferred, $100 par value, with accrued dividends. The new preferred stock was to be convertible for not less than fifteen years from date of issue into shares of common stock at a ratio to be determined by the closing price of the common on the New York Stock Exchange on the fifth day following authorization by the Commission.

The application recited that the necessary amendments to Alleghany's charter had been approved by the holders of 70% of the outstanding common stock, constituting 97% of the common stock which was voted.

On March 28, 1956, the appellees, Phillips and Breswick & Company who later asserted in the district court (R. 32) ownership of 700 shares of Alleghany common stock out of approximately 4,600,000 shares outstanding, filed with the Comission a petition for leave to intervene (R. 478–480), contending in broad terms that (1) the proposed exchange was not for a lawful purpose, was unfair to Alleghany's common stockholders, and would dilute their equity, (2) that the Commission must apply the standards of the Investment Company Act, (3) that the common stockholders lacked the protection of arms-length bargaining by persons owning only common stock, (4) that the common stockholders would be deprived of a fair return on their investment, (5) that the plan would result in an unnecessarily complex capital structure, and (6) that Alleghany should employ some other method for eliminating the dividend arrearages on its outstanding preferred stock. The appellees requested that Alleghany "be required to support its applications by sworn evidence subject to cross-examination" (R. 480).

On May 26, 1955, Division 4 of the Interstate Commerce Commission issued its report and order authorizing Alleghany to issue securities in accordance with its application, except that it imposed a condition which changed the date for determining the number of common shares into which each share of new preferred would be con-

vertible. In the course of its extensive analysis of the proposed issuance of securities, Division 4 noted that since 1946 Alleghany had engaged in various purchase and exchange programs designed to retire its outstanding preferred stocks and eliminate huge preferred stock dividend arrearages (R. 528), and that "the proposed issue of 6 percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years." (App. C, *infra*, p. 67.) These findings reflect the fact that since 1946 Alleghany had reduced its outstanding 5½% preferred shares (on which no dividends had been paid since 1931) from 667,539 shares to 136,744 shares, and had eliminated the corresponding dividend arrearages.

On June 22, the appellees' petition for reconsideration was denied by the entire Commission, which directed that the order should become effective on that date (R. 554). On June 23, Alleghany began to carry out the exchange, and on the same day, after 900,000 shares of new preferred had been delivered to holders of the old preferred, District Judge Dimock issued an order temporarily restraining Alleghany "from issuing, distributing or transferring any of the

6% Convertible Preferred Stock of Alleghany Corporation" (R. 56). The subsequent proceedings in the district court and before Mr. Justice Harlan are summarized in the prior opinion of this Court (353 U. S. at 158–159).

The proceedings upon remand in the District Court. Following the remand by this Court, the court below received briefs and, on September 5, 1957, it heard oral argument. On September 27, the court below rendered its decision holding invalid the Commission's order authorizing Alleghany to issue the securities here involved.

In its opinion, the District Court found that the Commission's order satisfied the provisions of Section 20a of the Interstate Commerce Act relating to issues of securities. Thus, dealing with the appellees' principal contentions, the District Court held (1) that Alleghany had made an adequate disclosure to the Commission of the various features of the proposed preferred stock exchange, (2) that the Commission's conclusions were "within the range of expert judgment" committed to it by the Congress, (3) that the Commission's findings were adequate, (4) that the Commission's order was not rendered invalid because it imposed a condition changing the date for determining the ratio for conversion of the new convertible preferred stock into common stock, and (5) that under Section 20a (6) the Commission's order

was not invalidated by its refusal to accord appellees an evidentiary hearing. (App. A, *infra*, pp. 29–31.)

However, the district court added that "There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central System as a prerequisite to the Commission's grant of the relief requested." The District Court then held (1) that the acquisition of control of "an already integrated system of separately existing carriers" requires the Commission's approval under Section 5 (2), and (2) that unless and until the Commission approves Alleghany's control of the New York Central System, the Commission may not exercise jurisdiction under Section 20a to authorize the issuance of securities by Alleghany Corporation.

THE QUESTIONS ARE SUBSTANTIAL

1. We submit that the decision below is in clear conflict with the decision and mandate of this Court in *Alleghany Corporation, et al.* v. *Breswick & Co., et al., supra.*

In its report in *Louisville & Jeffersonville Bridge and Railroad Company Merger, et al.*, 295 I. C. C. 11, 15–16 (R. 511–512), the entire Commission held that its approval under Section 5 (2) was not required where a noncarrier person acquired control of a group of carrier corporations under integrated operating control. That is, the Commission held that such a situation did not

involve an acquisition of control of "two or more carriers" for which its approval is required by Section 5 (2). The district court held to the contrary, both in its opinion on a preliminary injunction (134 F. Supp. 132, 142) (R. 617–618), and in Appendix II to its final opinion (138 F. Supp. 123, 137) (R. 673).

On the prior appeal to this Court, the question was briefed and argued fully by the parties (see, for example, pp. 47–63 of the brief for the Interstate Commerce Commission). In its opinion, this Court discussed the question as follows (353 U. S. at 161–162):

> The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, "two or more carriers."
>
> The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" refers to "control" and not to "approved control." There

> seems to be no reason to read in the word "approved." Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5 (7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction.

Thereafter, this Court directed (353 U. S. at 175) that

> the case [be] remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act.

In the district court, the Commission contended[1] that this Court had remanded the case to

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[1] The United States advised the district court of its position as follows:

"In view of the position of the United States in this case on direct appeal to the Supreme Court, we believe it inappropriate that the United States participate further in these proceedings. However, it should be emphasized that such action on the part of the United States should not be construed either as an approval or disapproval of the stock plan presently in issue before the court."

that court solely for determination as to whether the Commission's preferred stock order satisfied the requirements of the Interstate Commerce Act applicable to the issuance of securities; and that this Court had resolved all necessary questions relating to the Commission's power or jurisdiction to consider and act upon Alleghany's application under Section 20a for authorization to issue securities. However, the district court reasoned as follows (App. A, *infra*, pp. 46–47):

> We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order. The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that, in the absence of any finding that the public interest compelled such action, relief be granted for the

benefit of the wrongdoer, notwithstanding his wrong.

In the prior appeal, this Court held (353 U. S. at 160, 175) that the appellees' standing as common stockholders of Alleghany to challenge the Commission's order under Section 5 (3) that Alleghany should be considered as a carrier for purposes of securities regulations, derived solely from their interest in the dilution of the common stock's equity which they alleged would result from issuance of the new convertible preferred stock as authorized by the Commission. The appellees had standing to challenge only the power of the Commission to issue the preferred stock order. Thus, contrary to the district court, the issue before this Court was not the abstract one of whether Alleghany was subject to regulation under the Investment Company Act or the Interstate Commerce Act, but, rather, was the concrete question of whether the Commission had jurisdiction to determine and act upon Alleghany's application for authority under Section 20a to issue the securities here involved. Under these circumstances, we find it incredible that this Court left unresolved any necessary issue (decided by the court below and briefed and argued by the parties) as to the power of the Commission to exercise its jurisdiction to enter the preferred stock order—the order which was (and is) the sole basis for appellees' standing in this litigation.

2. We submit that this Court was clearly correct in holding that since the Commission had properly determined under Section 5 (3) that Alleghany should be considered as a carrier for the purposes of Section 20a, it was unnecessary to determine whether Alleghany's control of New York Central required approval by the Commission. Section 20a and the last sentence of Section 5 (3) prescribe the findings which the Commission must make before it authorizes the issuance of securities by such a noncarrier person (as Alleghany). Neither of these sections even suggests that the Commission must first of all make a finding as to whether Alleghany's control of New York Central is consistent with the public interest.

Moreover, since lack of approval of Alleghany's control of New York Central did not preclude the Commission from determining under Section 5 (3) that Alleghany's security issues should be regulated under Section 20a, it is entirely illogical to hold that such lack of approval later prevents the Commission from exercising its jurisdiction under Section 20a. If lack of such approval is to have jurisdictional consequences, it should do so on the initial issue of whether the Commission properly asserted jurisdiction under Section 5 (3), rather than to create a limbo during which Alleghany cannot issue securities without approval which the Commission is powerless to grant. The practical consequences of such a sit-

uation are illustrated by the fact that on August 13, 1956, in Finance Docket No. 19422, *Alleghany Corporation Notes,* the Commission, pursuant to Section 20a, authorized Alleghany to issue notes in the amount of $17,000,000 largely to refinance prior notes which were outstanding on a demand basis. The new notes will be due in September 1958. Under the decision below (which fails to give any weight to Section 20a (11), discussed below) these notes may be void, and Alleghany would be prohibited from issuing securities pending administrative and judicial proceedings on the issue of whether its control of New York Central is consistent with the public interest. We do not believe that any such result was contemplated by the opinion and mandate of this Court.

3. In its instant opinion, the court below reiterated its prior conclusion that Alleghany's control of New York Central Railroad Company and its subsidiaries involves control of two or more carriers, within the meaning of Section 5 (2) (b), for which the Commission's approval is required. We will not repeat here our arguments to the contrary in the prior appeal to this Court (I. C. C., br. in No. 114, October 1956, pp. 47–61). It is enough to point out that this aspect of the decision raises the extremely important question of whether Congress intended to require the Commission's approval whenever control of an existing carrier system is acquired by a noncarrier or by several noncarriers acting in concert.

However, starting with this conclusion as a premise, the district court further held that unless and until the Commission approved Alleghany's control of New York Central, it was without power under Section 20a to authorize Alleghany to issue securities. We submit that this holding is not only inconsistent with this Court's mandate but is based upon totally erroneous and irrelevant considerations.

The court below based its conclusion partly upon the provision of Section 5 (7) that where the Commission finds that any person unlawfully controls carriers, "it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuation of such violation." Assuming, arguendo, that Alleghany's control of New York Central is unlawful, nothing in Section 5 (7) even suggests that where, as this Court has held, the Commission has properly determined under Section 5 (3) that Alleghany's security issues shall be regulated under Section 20a, the Commission may not exercise its powers under that section unless and until it has approved such control. Where the Act is silent, the court below is without power to determine the order in which the Commission performs its various functions. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145–146; *F. C. C.* v. *WJR*, 337 U. S. 265, 272.

The court below sought to buttress its position by noting that Alleghany's holdings of New York

Central common stock are a substantial portion of its assets, by suggesting that after proceeding under Section 5 (7) the Commission might order Alleghany to divest itself of these New York Central shares, and by concluding that "it would be arbitrary" to authorize issuance of Alleghany's new preferred stock without considering the effect of such divestiture upon the asset value of the new preferred "before the stock becomes available for sale to the public." (App. A, *infra*, pp. 37–39.) These considerations are irrelevant to any issues properly before the district court.

No such question of asset coverage was raised by the appellees before the Commission, and they may not raise it in court for the first time. *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291; *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37. Moreover, it is clear that under any concept of standing to sue, the appellees, as holders of common stock of Alleghany, have no standing to concern themselves with the adequacy of the asset coverage of Alleghany's preferred stock. As this Court held, the appellant's sole standing relates solely to the threatened dilution of the common stock equity. It is settled that the court below lacked power to raise, and determine *sua sponte* issues which were barred to the plaintiff-appellees. *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498–501.

In any event, the question of asset coverage of Alleghany's new preferred stock was totally irrel-

evant in the circumstances of this case. To begin with, the new preferred was not to be offered for sale to the public; rather, it was to be offered in exchange for Alleghany's outstanding 5½% preferred stock. Whatever the effect of the conjectured divestiture by Alleghany of New York Central common stock, it would be equally applicable to the old preferred stock and to the new preferred shares to be issued in exchange for it. Moreover, the proposed exchange, by largely eliminating the preferred stock dividend arrearages, would substantially reduce the preferred stockholders' claim against Alleghany's assets. Also, the proceeds from a sale of Alleghany's holding of New York Central stock would simply be substituted for that stock. But, we repeat, the asset coverage of the new preferred is irrelevant, because that question was not open to consideration by the district court.

Also, the district court sought to distinguish, upon unique grounds, the Commission's order authorizing the issuance of new preferred stock from its prior status order under Section 5 (3) which was sustained by this Court. It did so by characterizing the former as "an order for the private benefit of Alleghany," and by adding that "there is no finding of public advantage to be gained from granting Alleghany's application." It furthur stated that "we hold that although there might be circumstances when such action could

reasonably be taken before approving the acquisition of control over the Central system, there were no findings or facts which justify such action in the present case." (App. A, *infra*, pp. 40, 41, 47.)

Briefly, the Commission does not issue orders for the "private benefit" of Alleghany Corporation. It authorized Alleghany to issue new 6% preferred stock in exchange for its outstanding 5½% preferred stock, as the last step in a program to eliminate from Alleghany's capital structure the preferred stock dividend arrearages accrued on the 5½% preferred stock. Since 1946, the outstanding shares of such stock had been reduced from 667,539 shares to 136,744 shares (with dividend arrearages amounting to more than $17,000,000). The issuance of securities by railroad holding companies was subjected to the Commission's jurisdiction under Section 20a for reasons which were illustrated by the Commission in *Chesapeake & Ohio R. Co. Purchase*, 261 I. C. C. 239, 255 (1945) as follows:

> Alleghany, under prior management in times of great financial stress and for its own purposes caused or permitted carrier corporations which it controlled to pay dividends when they were not being earned, or to pay dividends when they were under a heavy burden of debt, when traffic was declining, and earnings were decreasing notwithstanding scrimping of maintenance.

Here, the Commission acted to promote a current financial structure for Alleghany so as to obviate any future pressure or temptation to cause carriers under its control to engage in unsound financial practices. Congress has so empowered the Commission to act in the public interest—not for the "private benefit" of Alleghany Corporation.

Congress has also anticipated the district court's thought that there might be circumstances warranting the Commission's action in authorizing Alleghany to issue new preferred stock prior to approval of its control of New York Central. This Court is aware (353 U. S. at 151) that of the authorized issue of 1,347,440 shares of new 6% convertible preferred stock, approximately 900,000 shares have been physically delivered to old preferred shareholders entitled to receive them. Also, this Court long ago recognized that Congress intended prompt determination of financing proposals subject to Section 20a, in view of the necessity for relating the terms of such transactions to prevailing market conditions. *New York Central Securities Co.* v. *United States*, 287 U. S. 12, at 28. This legislative objective appears not only in the optional hearing provisions of Section 20a (6),[2] but also in the unique command of Section 20a (11) that

[2] Section 20a (6) provides in pertinent part that "The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

> no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to *procedure and other matters preceding the entry of such order of authorization.* [Emphasis supplied.]

There has been no judicial construction as to the scope and range of judicial review permitted by Section 20a (11) where, as here, securities have been issued in compliance with an order of the Commission. Presumably, it cuts off review of collateral matters unrelated to the basic legality and fairness of the immediate securities transaction. More important, it represents a finding by Congress that where the Commission has found that a proposed issuance of securities by a railroad holding company subject to Section 20a is both lawful and consistent with the public interest as required by Sections 5 (3) and 20a (2), there is "public advantage to be gained" by permitting it to be carried out before it is made impractical by changing market conditions. Indeed, the underlying issue in this case, after two years of litigation, is whether a voluntary recapitalization which the Commission has found to be in the public interest, in findings now sustained by the court

below, is to be permitted to become effective before it is rendered irrelevant by changing business and market conditions.

The court below repeatedly referred to the Investment Company Act of 1940 as a basis for its conclusion that the Commission cannot authorize Alleghany to issue securities until it has approved its control of New York Central. Thus, the court stated that Alleghany "now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest." Again, it stated that the Commission "would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; * * *." Congress has not directed or authorized the Interstate Commerce Commission to apply the Investment Company Act to persons whose issuance of securities is subject to regulation under Section 20a. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 79. The only pertinent provision of the Investment Company Act is Section 3 (c) (9) which exempts from regulation under that Act "any company subject to regulation under the Interstate Commerce Act." As this Court has already held in this case, the Investment Company Act is entirely

irrelevant to the interpretation of the Interstate Commerce Act. Since the Commission validly has asserted jurisdiction to regulate the issuance of securities by Alleghany, it was clear error for the court below to give perhaps controlling weight to the policies which it found in the Investment Company Act.

RELIEF REQUESTED

We contend that the decision below is in clear conflict with the prior decision and mandate of this Court. Moreover, the opinion of the district court suggests no valid reason in law or policy for this Court to reconsider or revise its mandate that "the case be remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

Accordingly, we submit that this Court should enter an order summarily reversing the judgment of the district court. Such relief has been granted by this Court in appropriate circumstances. *Franklin* v. *Jonco Aircraft Corporation*, 346 U. S. 868, rehearing denied, 346 U. S. 917; *White* v. *Howard*, 347 U. S. 910. Since the district court has already sustained the Commission's order as complying in all other respects with the requirements of the Interstate Commerce Act, such a

summary reversal would require it to enter judgment in favor of the appellants.[3]

If this Court concludes that its decision and mandate are not offended by the decision below, we submit that the public interest requires determination by this Court at the earliest possible date of the issues raised by the district court in setting aside the Commission's order.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

NOVEMBER 1957.

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[3] We contend that the decision of the district court is unassailable insofar as it holds (1) that the Commission was not required to accord a hearing to the appellees, (2) that it was sufficiently informed of the details of the preferred stock exchange, (3) that its findings were adequate, (4) that its conclusion was within the range of discretion entrusted to it by Congress, and (5) that its order was not invalidated by the condition which it imposed. While the appellees are free to contend to the contrary, they must do so in the face of the facts that in Section 20a, as in Section 5, Congress has entrusted the Commission with unusually broad discretionary powers (*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88), and that Section 20a evidences a Congressional purpose to accord a large measure of finality to Commission orders authorizing the issuance of securities.

APPENDIX A

United States District Court,
Southern District of New York

Civ. 101–114

BRESWICK & CO., RANDOLPH PHILLIPS AND MYRON NEISLOSS, AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHER COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION SIMILARLY SITUATED, PLAINTIFFS

AGAINST

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, ET AL., DEFENDANTS

Before: CLARK, Circuit Judge, and DIMOCK and WALSH, District Judges.

Appearances: Rosston, Hoft & Brussel, Esqs. (George Brussel, Jr., and Eugene G. King, of Counsel), for Breswick & Co. and Myron Neisloss.

Randolph Phillips, Pro Se.

Robert W. Ginnane, Esq., General Counsel for Interstate Commerce Commission (B. Franklin Taylor, Jr., Assistant General Counsel, with him on the brief).

Simpson, Thacher & Bartlett, Esqs.; White & Case, Esqs.; Wheeler & Wheeler, Esqs. (Whitney North Seymour, David Hartfield, Jr., Edward K.

Wheeler, and David W. Wallace, of Counsel), for Alleghany Corporation.

Proskauer, Rose, Goetz & Mendelsohn, Esqs. (Harold H. Levin, Marvin E. Frankel, and Allen L. Feinstein, of Counsel), for Defendants Joseph S. Gruss, et al.

Edward M. Garlock, Esq., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

Samuel A. Mehlman, Pro Se.

Alexander Kahan, Esq., and A. Lichtenstein, Esq. (Alexander Kahan, of Counsel), for Adelaide Neuwirth and common stockholders of Alleghany Corporation, respectively.

WALSH, D. J.

Plaintiffs common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1]

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[1] Briefly the history of this proceeding is as follows:

March 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

April 6, 1955—Plaintiffs, in a related action, *Brewick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commended by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plain-

We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this

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tiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J., dissenting). 134 F. Supp. 132.

August 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

November 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined, it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction as modified by Mr. Justice Harlan, was continued.

April 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for reconsideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

holding and held that the issue was subject to the Interstaate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[18]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock, according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used. They also claim that

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[18] The scope of the remand was stated as follows, 353 U. S. at p. 175:

"For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. * * *"

the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words, whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and thus the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substantial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the

questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises." 41 Stat. 594, 49 U. S. C. § 20a (3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a (6) of the Interstate Commerce Act, 41 Stat. 459, 49 U. S. C. § 20a (6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its in-

vestigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the noncall period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161–2). It said:

"The District Court held that whatever control Alleghany had over Central did not fit within the statutory

necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

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requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5 (7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J. B. & R. Co. Merger*, 290 I. C. C.

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdiction over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.—Control,* 282 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.—Receivership,* 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company,

725, 733, 744, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.* (353 U. S. 151). See pp. 425, 435, 441–2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

290 I. C. C. 725, 733–4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11.[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> It shall be lawful, with the approval and authorization of the Commission * * * for a person which is not a carrier to acquire control of two or more carriers * * *. (§ 5 [2] [a].)

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the unchallenged prior consistent administra-

[2b] Record, op. cit., pp. 425–7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506–515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143–44; 138 F. Supp. 123. 137–38.

[5] 353 U. S. at p. 161.

tive interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system. (353 U. S. at p. 170.) [6a]

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[6] In *Louisville & J. B. & R. Co. Merger*, 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization." [Citing *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery*, 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.*, 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.*, 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6a] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this

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small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.—Purchase*, 271 I. C. C. 513 (1948).

chapter shall apply to such a violation by another person. [Emphasis added.]

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation, the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger*, *supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, 6, Record, op. cit. pp. 511-12, 513 (full Commission).

¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the

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[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 186):

	Cost	Indicated market quotations
New York Central Securities	$6,918,118	$9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	14,418,118	19,657,800
Total investments	33,342,393	67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528–530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger*, *supra*, 290 I. C. C. 725, at p. 741.

public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20 (a) is for the protection of investors as well as persons dependent upon transportation."

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[11] While the dominant purpose of § 20 (a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing" (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190–191 (1931).

"* * *If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Com-

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act,

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binations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20 (a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp 8, 9 (64th Cong, 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

"Mr. McKenzie. Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

"Mr. Rayburn. It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it."

51 Cong. Rec. 0687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20 (a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Invest-

is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order, which made available to the Commission information for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Co mission that his control of

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ment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

"The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the Statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control [12] and usually compelled divesti-

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger–Inves-*

ture [13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval

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tigation of Control, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 F. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control*, *supra*, 60 M. C. C. 321, 327, 329 (1954) it was said:

"The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits * * * ". (327)

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"* * * In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion this record shows such a flagrant disregard for the law that divestiture should be ordered." (329.)

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger*, *supra*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control*, *supra*, 40 M. C. C. 499 (1946);

was in good faith [14] due to an oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Su-

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Manlowe-Control, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 636 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarily, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259–60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kilovich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control*; op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"* * * and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest."

The fact that the applicant was in good faith unaware of illegality, is a significant consideration. *Coast Lines Truck Service, Inc.-Control and Merger*, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and*

preme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control, it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any

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Merger, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *Lee-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 257 (dissenting opinion) (1945).

realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be

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[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purpose of being heard before the entry of the merger and status orders. 353 U. S. 151, 173-175.

overlooked or that, in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer, notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings or facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

(S) CHARLES E. CLARK,
U. S. C. J.

(S) E. J. DIMOCK,
U. S. D. J.

(S) LAWRENCE E. WALSH,
U. S. D. J.

Dated September 27, 1957.

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[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger*, *supra*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

APPENDIX B

United States District Court, Southern District of New York

Civ. 101–114

BRESWICK & CO., RANDOLPH PHILLIPS AND MYRON NEISLOSS, AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHER COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION SIMILARLY SITUATED, PLAINTIFFS

AGAINST

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, ET AL., DEFENDANTS

Final Judgment

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321–2325 of Title 28 of the United States Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respec-

tive parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, adjudged and decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended: and it is

Further ordered, adjudged and decreed that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

Further ordered, adjudged and decreed that the enforcement of this judgment and the injunc-

tions issued herein, subject to the exceptions stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

Further ordered, adjudged and decreed that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

Further ordered, adjudged and decreed that, despite the provisions of the last preceding paragraph the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon

the expiration of the stay provided herein for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y., October 17, 1957.

CHARLES E. CLARK,
U. S. C. J.

E. J. DIMOCK,
U. S. D. J.

LAWRENCE E. WALSH,
U. S. D. J.

APPENDIX C

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18866

ALLEGHANY CORPORATION STOCK

Submitted April 14, 1955. Decided May 26, 1955

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

Burton K. Wheeler and *Edward K. Wheeler* for applicant.

George Brussel, Jr. and *Joseph B. Hyman* for interveners in opposition to the application.

Randolph Phillips, pro se, intervener in opposition.

DIVISION 4. COMMISSIONERS JOHNSON, MITCHELL AND TUGGLE

BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable use to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own,

hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I. C. C. 725, we approved and authorized, among other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par value

$10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for

shares of its series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p. m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the Series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p. m. on the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent pre-

ferred stock in temporary form in accordance with the instructions set forth in the letter of transmittal accompanying the certificates surrendered. The applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p. m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certificates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The ap-

plication represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However, none of them has entered into any agreement with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends, following the issuance of the 6-percent preferred stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either 1953 or 1954. Because of the uncertainty as to the number of

shares of series A preferred stock which may be surrendered; the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note,* 282 I. C. C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes,* 282 I. C. C. 817. The applicant has agreed, in connection with these two loans, as well as in the indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities,* 282 I. C. C. 818, were issued, among other things, not to pay, without the consent of such banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set for in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ percent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6 percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution

and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955, will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-per-

cent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock, or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors. There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of common stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment for dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A prefered stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Ex-

change on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment

of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A preferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

J. P. Morgan & Co., Incorporated, and Colonial Trust Company, both of New York City, have

been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant, upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective holdings, any shares of common stock

issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities, supra,* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock

which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of benefiting the remaining holders of such preference stocks, and eventually restoring an asset equity for the common stock. As a result of this program, the applicant has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A

dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $333,470, and $103,380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrearages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the

effect of diluting the rights of the common stockholders, as such rights then exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

The short term effect of the exchange of series A preferred stock for 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

Assets		
Total investments		$43, 264, 637
Current assets		8, 256, 621
Deferred assets		7, 075
Unadjusted debits		1, 362, 699
Total assets		52, 891, 032
Liabilities		
Capital stock:		
$4 prior preferred convertible	$2, 067, 600	
Preferred	13, 674, 400	
Common	4, 637, 797	
Premiums on common stock	142, 297	
Total stock		20, 522, 094
Long-term funded debt unmatured:		
Book liability	$21, 200, 000	
Reacquired and held in treasury	504, 000	
Total long-term debt		20, 696, 000
Current liabilities		2, 427, 928
Deferred liabilities		2, 050
Surplus—unearned	$106, 976, 335	
Earned-appropriated	718	
Earned-unappropriated (deficit)	97, 734, 093	
Total surplus		9, 242, 960
Total liabilities		52, 891, 032

Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,-

378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into an agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the max-

imum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accurately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes within exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities*, 257 I. C. C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

Interveners allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Interveners state that issue of stock as proposed will dilute the equity of the common stock and, as a result thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Interveners state that the common stockholders have not been protected by "arm's-length bargain-

ing" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (516,500 shares) was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his investment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of

making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the findings required by the statute as a condition to approval of the issue of securities properly may be made.

It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation

of not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

ORDER

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 26th day of May, A. D. 1955

Finance Docket No. 18866

ALLEGHANY CORPORATION STOCK

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made

and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C. F. R. 56);

It is further ordered, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

It is further ordered, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY,
Secretary.

APPENDIX D

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 et seq. are as follows:

> SEC. 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) * * * or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;
>
> * * * * * *
>
> SEC. 5 (3). Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of Part II, and section 313 of part III, (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), in-

cluding in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

SEC. 5 (7). The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

* * * * *

SEC. 20a (2). From and after one hundred and twenty days after this section

takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities or any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * *

SEC. 20a (11). Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if

issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *

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